

AMENDING THE WATER RESOURCES DEVELOPMENT ACT OF 1986 TO
CLARIFY THE ROLE OF THE CHEROKEE NATION OF OKLAHOMA WITH
REGARD TO THE MAINTENANCE OF THE W.D. MAYO LOCK AND DAM IN
OKLAHOMA

SEPTEMBER 23, 2011.—Ordered to be printed

Mr. HASTINGS of Washington, from the Committee on Natural
Resources, submitted the following

R E P O R T

[To accompany H.R. 1421]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 1421) to amend the Water Resources Development Act of 1986 to clarify the role of the Cherokee Nation of Oklahoma with regard to the maintenance of the W.D. Mayo Lock and Dam in Oklahoma, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 1421 is to amend the Water Resources Development Act of 1986 to clarify the role of the Cherokee Nation of Oklahoma with regard to the maintenance of the W.D. Mayo Lock and Dam in Oklahoma.

BACKGROUND AND NEED FOR LEGISLATION

In the 1950s, Congress approved and appropriated money to the Army Corps of Engineers to construct the McClellan-Kerr navigation system along the Arkansas River. However, in the 1970s, the U.S. Supreme Court ruled that the Cherokee Nation, Chickasaw Nation, and Choctaw Nation owned parts of the bed and banks of the Arkansas River affected by this project.

After several years of litigation against the State of Oklahoma and negotiations with the United States, a settlement was reached with all three tribes. In 1981, the Cherokee Nation asked Congress for the exclusive right to build a hydroelectric facility on its Arkansas River land. In 1986, Congress enacted the Water Resource Development Act of 1986 (Public Law 99-662), which gave the tribe this authority.

While section 1117 of the Water Resource Development Act of 1986 gave the tribe exclusive rights to develop the hydroelectric facility on their land, it also required that once the hydroelectric facility is built, the tribe must transfer its ownership to the Army Corps of Engineers. The Corps would then manage, operate, and maintain the facility. Once the facility becomes operational, the Southwestern Power Administration would then market the power, so that debt from the construction of the hydroelectric facility would be repaid and royalties would be given to the tribe.

Today, the Cherokee Nation now has the capital to move forward with developing, operating, and maintaining a hydroelectric facility, and has plans to construct a 30 megawatt hydroelectric facility that would employ between 150 and 200 workers.

This bill would amend Section 1117 of the 1986 Water Resources Development Act of 1986 so that the Cherokee Nation of Oklahoma may design and construct one or more hydroelectric generation facilities without transferring title to the federal government. Furthermore, the tribe may market the electricity generated from the facilities.

COMMITTEE ACTION

H.R. 1421 was introduced on April 7, 2011, by Congressman Dan Boren (D-OK). The bill was referred primarily to the Committee on Transportation and Infrastructure, and additionally to the Committee on Natural Resources. Within the Committee on Natural Resources, the bill was referred to the Subcommittee on Indian and Alaska Native Affairs. The bill was also referred to the Committee on Transportation and Infrastructure. On July 12, 2011, the Subcommittee on Indian and Alaska Native Affairs held a hearing on the bill. On July 20, 2011, the Natural Resources Committee met to consider the bill. The Subcommittee on Indian and Alaska Native Affairs was discharged by unanimous consent. No amendments were offered, and the bill was ordered favorably reported to the House of Representatives by unanimous consent.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 1421—A bill to amend the Water Resources Development Act of 1986 to clarify the role of the Cherokee Nation of Oklahoma with regard to the maintenance of the W.D. Mayo Lock and Dam in Oklahoma

H.R. 1421 would give the Cherokee Nation exclusive authority to construct hydroelectric generating facilities at the W.D. Mayo Lock and Dam on the Arkansas River in Oklahoma. The bill would also grant the Cherokee Nation sole responsibility to operate and maintain the facilities as well as to market the hydroelectric power. Based on information from the Army Corps of Engineers, the Southwestern Power Administration (SWPA), and the Cherokee Nation, CBO estimates that enacting the bill would have no significant net impact on the federal budget. Enacting H.R. 1421 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

The Water Resources Development Act of 1986 authorized the Cherokee Nation—a nonfederal entity—to develop hydroelectricity at the federal dam but required that the title of the completed facilities be transferred to the Corps to operate and maintain the facilities. Under that act, the Southwestern Power Administration was required to market any electric power generated at the facility. Hydroelectric power has not been developed at the dam and, according to interested parties, is unlikely to be developed under current law. H.R. 1421 would eliminate those requirements and allow the Cherokee Nation to retain the title to any hydroelectric improvements, operate and maintain the facilities, and market the power.

H.R. 1421 would require the Cherokee Nation to pay all costs associated with the design and construction of the facilities. The bill would authorize the Corps to provide assistance for those activities subject to reimbursement of all costs. The Cherokee Nation would also be responsible for reimbursing SWPA for the cost to transmit power from the dam. Because federal agencies would be reimbursed for all costs, CBO estimates that implementing the legislation would have no significant net impact on the federal budget.

H.R. 1421 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Aurora Swanson. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. Based on information from the Army Corps of Engineers, the Southwestern Power Administration (SWPA), and the Cherokee Nation, CBO estimates that enacting the bill would have no significant net impact on the federal budget. Enacting H.R. 1421 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

3. General Performance Goals and Objectives. This bill does not authorize funding and therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives does not apply.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 1117 OF THE WATER RESOURCES DEVELOPMENT ACT OF 1986

[SEC. 1117. W.D. MAYO LOCK AND DAM.]

[(a) Notwithstanding any other provision of law, the Cherokee Nation of Oklahoma is authorized to design and construct hydroelectric generating facilities at the W.D. Mayo Lock and Dam on the Arkansas River in Oklahoma, as described in the report of the Chief of Engineers dated December 23, 1981: *Provided*, That, the agreement described in subsection (d) of this section is executed by all parties described in subsection (b) of this section.

[(b)(1) Conditioned upon the parties agreeing to mutually acceptable terms and conditions, the Secretary and the Secretary of Energy, acting through the Southwestern Power Administration, may enter into a binding agreement with the Cherokee Nation of Oklahoma under which the Cherokee Nation of Oklahoma agrees—

[(A) to design and initiate construction of the generating facilities referred to in subsection (a) of this section within three years after the date of such agreement,

[(B) to reimburse the Secretary for his costs in—

[(i) approving such design and inspecting such construction, and

[(ii) providing any assistance authorized under subsection (c)(2) of this section, and

[(C) to release and indemnify the United States from any claims, causes of action, or liabilities which may arise from such design or construction.

[(2) Such agreement shall also specify—

[(A) the procedures and requirements for approval and acceptance of such design and construction are set forth,

[(B) the rights, responsibilities, and liabilities of each party to the agreement are set forth, and

[(3) the amount of the payments under subsection (f) of this section, and the procedures under which such payments are to be made, are set forth.

[(c)(1) No Federal funds may be expended for the design or construction of the generating facilities referred to in subsection (a) of this section prior to the date on which such facilities are accepted by the Secretary under subsection (d) of this section.

[(2) Notwithstanding any other provision of law, the Secretary is authorized to provide, on a reimbursable basis, any assistance requested by the Cherokee Nation of Oklahoma in connection with the design or construction of the generating facilities referred to in subsection (a) of this section.

[(d)(1) Notwithstanding any other provision of law, upon completion of the construction of the generating facilities referred to in subsection (a) of this section, and final approval of such facilities by the Secretary—

[(A) the Cherokee Nation of Oklahoma shall transfer title to such facilities to the United States, and

[(B) the Secretary shall—

[(i) accept the transfer of title to such generating facilities on behalf of the United States, and

[(ii) operate and maintain such facilities.

[(2) The Secretary is authorized to accept title to such facilities only after certifying that the quality of the construction meets all standards established for similar facilities constructed by the Secretary.

[(e) Pursuant to any agreement under subsection (b) of this section, the Southwestern Power Administration shall market the excess power produced by the generating facilities referred to in subsection (a) of this section in accordance with section 5 of the Act of December 22, 1944 (58 Stat. 890; 16 U.S.C. 825s).

[(f) Notwithstanding any other provision of law, the Secretary of Energy, acting through the Southwestern Power Administration, is authorized to pay to the Cherokee Nation of Oklahoma, in accordance with the terms of the agreement entered into under subsection (b) of this section, out of the revenues from the sale of power produced by the generating facilities of the interconnected systems of reservoirs operated by the Secretary and marketed by the Southwestern Power Administration—

[(1) all reasonable costs incurred by the Cherokee Nation of Oklahoma in the design and construction of the generating facilities referred to in subsection (a) of this section, including the capital investment in such facilities and a reasonable rate of return on such capital investment, and

[(2) for a period not to exceed fifty years, a reasonable annual royalty for the design and construction of the generating facilities referred to in subsection (a) of this section.

[(g) Notwithstanding any other provision of law, the Secretary of Energy, acting through the Southwestern Power Administration, is authorized—

[(1) to construct such transmission facilities as necessary to market the power produced at the generating facilities referred to in subsection (a) of this section with funds contributed by non-Federal sources, and

[(2) to repay those funds, including interest and any administrative expenses, directly from the revenues from the sale of power produced by the generating facilities of the inter-

connected systems of reservoirs operated by the Secretary and marketed by the Southwestern Power Administration.

[(h) There are authorized to be appropriated to the Secretary for the fiscal year in which title to the generating facilities is transferred and accepted under subsection (d) of this section, and for each succeeding fiscal year, such sums as may be necessary to operate and maintain such facilities.]

SEC. 1117. W.D. MAYO LOCK AND DAM.

(a) IN GENERAL.—Notwithstanding any other provision of law, the Cherokee Nation of Oklahoma may—

(1) design and construct one or more hydroelectric generating facilities at the W.D. Mayo Lock and Dam on the Arkansas River in Oklahoma, subject to the requirements specified in subsection (b) and in accordance with the conditions specified in this section; and

(2) market the electricity generated from any such facility.

(b) PRE-CONSTRUCTION REQUIREMENTS.—(1) The Cherokee Nation shall obtain any permit required by Federal or State law before the date on which construction begins on any hydroelectric generating facility at the location referred to in subsection (a), except that the Cherokee Nation shall be exempt from any licensing requirements under the Federal Power Act (16 U.S.C. 791a et seq.) that may otherwise be required for the construction, operation, or maintenance of hydroelectric generating facilities.

(2) The Cherokee Nation may initiate the design or construction of any such facility only after the Secretary reviews and approves the plans and specifications for such design and construction.

(c) PAYMENT OF DESIGN AND CONSTRUCTION COSTS.—(1) The Secretary of the Army may accept funds offered by the Cherokee Nation and use such funds to carry out the design and construction of any hydroelectric generating facility.

(2) The Cherokee Nation shall—

(A) bear all costs associated with the design and construction of any such hydroelectric generating facility; and

(B) provide any funds necessary for such design and construction to the Secretary of the Army prior to the Secretary initiating any activities related to the design and construction of a hydroelectric generating facility under this section.

(d) ASSUMPTION OF LIABILITY.—The Cherokee Nation shall—

(1) hold all title to any hydroelectric generating facility constructed under this section and may, subject to the approval of the Secretary of the Army, assign such title to a third party;

(2) be solely responsible for—

(A) the operation, maintenance, repair, replacement, and rehabilitation of any such facility; and

(B) the marketing of the electricity generated by any such facility; and

(3) release and indemnify the United States from any claims, causes of action, or liabilities that may arise out of any activity undertaken to carry out this section.

(e) ASSISTANCE AVAILABLE.—Notwithstanding any other provision of law, the Secretary of the Army may provide any technical and construction management assistance that is requested by the Cherokee Nation relating to the design and construction of any hydroelectric generating facility described in subsection (a).

(f) *THIRD PARTY AGREEMENTS.—The Cherokee Nation may enter into agreements with the Secretary of the Army or a third party that the Cherokee Nation or the Secretary determines are necessary to carry out this section.*

